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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

Number 885

UNITED STATES OF AMERICA ex rel.
Ralph Falbo, Sr., *Relator-Petitioner*

v.

M. L. KENNEDY, SUPERINTENDENT, and
FRANCIS BIDDLE, ATTORNEY GENERAL,
Respondents

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

HAYDEN C. COVINGTON
Counsel for Relator-Petitioner

INDEX

Subject Index

PAGE

Petition 1

Summary of matters involved 1

1. Preliminary statement 1

2. Opinion of court below 2

3. Statutory provisions sustaining jurisdiction 2

4. Timeliness of the petition 2

5. Statutes and regulations involved 3

6. Constitutional provisions involved 3

7. Questions presented 3

8. How the issues were raised 5

9. Statement of the history of the case and the facts alleged 6

History 6

Facts alleged 7

Reasons relied on for allowance of writ 10

Supporting brief 14

Appendix, Opinion of United States Fourth Circuit Court of Appeals, delivered March 17, 1944 16

Cases Cited

Bowen v. Johnson
306 U. S. 19 12

Burrus, In re
136 U. S. 586 11

Cobbledick v. United States
309 U. S. 323 11

Escoe v. Zerbst
295 U. S. 490 12

Falbo v. United States
320 U. S. 549 ..... 1, 2, 10

PAGE

Fisk, Ex parte
113 U. S. 713 11

Givings v. Zerbst
255 U. S. 11 11

Gonzales v. Williams
192 U. S. 1 13

Grimley, In re
137 U. S. 147 11

Holiday v. Johnson
313 U. S. 342 12

Johnson v. Sayre
158 U. S. 109 11

Johnson v. Zerbst
304 U. S. 458 12

Kessler v. Strecker
307 U. S. 22 13

Lloyd Sabaudo v. Etling
287 U. S. 329 13

Merryman, Ex parte
17 F. Cas. 144, 153 13

Milligan, Ex parte
2 Wall. 2, 120 13

Mooney v. Holohan
294 U. S. 103 12

Moore v. Dempsey
261 U. S. 86 12

Morrissey, In re,
137 U. S. 157 11

Ng Fung Ho v. White
259 U. S. 276 13

Oklahoma Operating Co. v. Love
252 U. S. 331 11

Pyle v. Kansas
317 U. S, 213 12

Quirin, Ex parte
317 U. S. 1 13

Reed, Ex parte
100 U. S. 13 11

Cases Cited

PAGE

Sibbach v. Wilson & Co.
312 U. S. 1 11

Smith v. O'Grady
312 U. S. 329 12

Stewart, Ex parte
47 F. Supp. 410 11

Ver Mehren v. Sirmeyer
36 F. 2d 876 ..... 2, 11

Wadley Southern Ry. Co. v. Georgia
235 U. S. 651 12

Waley v. Johnston
316 U. S. 101 12

Walker v. Johnston
312 U. S. 275 12

Statutes Cited

Judicial Code
Section 249 (a) 2

United States Code
Title 28, Sections 451-464 ..... 3, 13
Title 50, Appendix ss. 301-318 ["Selective Training and Service Act of 1940", (54 Stat. 885):]
[Section 5 (d)] 3, 7, 10
[Section 11] 3, 12

United States Constitution
Article I, Section 9, Clause 2 ..... 3, 13
Article I, Section 9, Clause 3 ..... 3, 4, 5
Article III, Section 2, Clauses 1-3 ..... 3, 9
Amendment V 3, 4, 5, 9, 12
Amendment VI 3, 4, 5, 9

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Ralph Falbo, Sr., presents this petition for writ of certiorari and shows unto the court as follows:

Summary of Matters Involved

1. Preliminary Statement.

This court's opinion in the case of *Falbo* v. *United States,* 320 U. S. 549, does not foreclose the questions presented on this petition for writ of certiorari, as disclosed in the statement, reasons relied upon for granting this petition for the writ and the accompanying brief filed separately herein supporting this petition. The constitutional and statutory provisions securing and implementing the habeas corpus writ makes necessary the judicial review

of illegal orders upon which judgments of conviction are based in the same way that the ancient writ is available to review convictions by court-martial where it is claimed that there is no jurisdiction of the administrative agency to act because of violation of the law and regulations. *Ver Mehren* v. *Sirmeyer,* 36 F. 2d 876. The *Falbo* decision decided only the narrow question presented and nothing else. It cannot be said that the Selective Training and Service Act repealed the statutes of the United States Code implementing, securing and broadening the writ of habeas corpus. Indeed habeas corpus was recognized by this court in the *Falbo* opinion as available to test the administrative order after reporting for induction. It cannot be said that the same writ is not available to one illegally convicted because of his failure to comply with the order. If it is said that the writ must be denied then it must be held to be an illegal suspension of the writ of habeas corpus contrary to the Constitution forbidding the suspension of the writ.

2. Opinion of Court Below.

The opinion of the United States Circuit Court of Appeals is not yet reported in the *Federal Reporter* but it appears in the record certified and is printed as an appendix to this petition for writ of certiorari at pages 16-17, infra this petition.

3. Statutory Provisions Sustaining Jurisdiction.

The jurisdiction of this Court rests on Section 249 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

4. Timeliness of the Petition.

The judgment of the Circuit Court of Appeals was entered on March 17, 1944. The petition for writ of certiorari is filed within three months from the date of the entry of such judgment in said court.

5. Statutes and Regulations Involved.

The proper construction of the Habeas Corpus Act, (28 U. S. C. sections 451-464) is involved. There is drawn in question the construction and application of, and the invalidity of, the Selective Training and Service Act of 1940, as amended, Sections 3 (a), 5 (d), 10 (a), and 11. (50 U. S. C., Appendix 301-318); and Selective Service Regulations 601.5, 622.44, 623.1, 623.2, 623.21, 623.61, 625.1, 625.2, 626.1, 626.2, 627.22, 633.1, 633.2, 633.21, 642.41, all of which regulations appear in 32 C. F. R. 1941 Supp., 601.7 et seq.

6. Constitutional Provisions Involved.

Clause 2 of Section 9 of Article I concerning the writ of habeas corpus is involved. Clause 3 of Section 9 Article I prohibiting bills of attainder is invoked. Clauses 1-3 in Section 2 of Article III, investing the judicial powers, and the Fifth and Sixth Amendments are relied upon.

7. Questions Presented.

(1) Does the writ of habeas corpus lie in behalf of the prisoner, who failed to report for induction, to test the order of the Selective Service System alleged to be in excess of authority of the System, contrary to the undisputed evidence, without support of substantial evidence, arbitrary and capricious, and in violation of the due process clause of the Fifth Amendment to the United States Constitution?

(2) Does the writ of habeas corpus lie to release the prisoner from a judgment of conviction based upon an indictment charging him with a violation of the Selective Training and Service Act by failure to report for induction where it is alleged that the prisoner is exempt from duty and that the Selective Service System acted in excess of its authority, arbitrarily and capriciously, and in violation of the due process clause in rendering the order to report

for induction upon which the indictment and the judgment of conviction are based?

(3) Are the Selective Training and Service Act of 1940, the Regulations thereunder requiring one to report for induction, the Habeas Corpus Act and constitutional provisions guaranteeing the writ of habeas corpus, to be construed so as to deny, suspend and withhold from an exempt registrant the writ of habeas corpus because he failed to report for induction when it is alleged that the order directing him to report is illegal and unconstitutional?

(4) Is the writ of habeas corpus available to test the unconstitutionality and invalidity of orders of an administrative agency, the draft boards that ordered the prisoner to report, when it is alleged that he failed to report for induction, was prosecuted and convicted under the Selective Training and Service Act for having failed to report for induction?

(5) Did the United States District Court illegally deny and suspend the writ of habeas corpus, contrary to clause 2 of section 9 of Article I of the United States Constitution, because the prisoner did not report for induction?

(6) Is the criminal sanctions clause of the Selective Training and Service Act of 1940 unconstitutional and void because contrary to clause 3 of Section 9 of Article I, Article III, and the Fifth and Sixth Amendments to the United States Constitution, because denying the prisoner the right to show in defense against the indictment upon which his conviction was based that he was exempt from duty and that the order was illegal and unconstitutional?

(7) Does the writ of habeas corpus lie to test the alleged invalidity of a judgment of conviction rendered against the prisoner in the United States District Court, where it is alleged that the trial and conviction were void because denying the prisoner his rights to show that the order upon which the indictment was based was illegal and

unconstitutional and contrary to clause 3 of Section 9 of Article I, and the Fifth and Sixth Amendments to the United States Constitution?

(8) Did the United States District Court commit reversible error in holding that the Attorney General was not a proper party respondent and in dismissing him as a party to the proceeding?

(9) Should judicial review of the action of the administrative agency in ordering the prisoner to report be had by trial de novo in so far as it affects the classification of prisoner?

(10) Since the records before the Selective Service System show that the prisoner was a duly recognized minister of religion under the Selective Training and Service Act and the Regulations thereunder, was he exempt from all training and service under the Act?

(11) Did the Selective Service System exceed its authority in classifying the prisoner as liable for training and service and in ordering the prisoner to report for induction in excess of the jurisdiction of said Selective Service System?

(12) Did the Selective Service System act arbitrarily and capriciously in classifying the prisoner as liable for training and service when there was no evidence to show that he was not a minister of religion as claimed and the findings of the agency were contrary to the evidence?

8. How the Issues were Raised.

The issues were raised by the petition for writ of habeas corpus, the motions of the respondents, and the order of the court below. (Ap. F. 1-20.)[1]

[1] APPENDIX, printed separately and filed herewith for this case, is hereinafter designated by abbreviation Ap. F.

9. Statement of the History of the Case and the Facts Alleged.

HISTORY

This civil action was begun by filing a petition for writ of habeas corpus in the name of the United States of America upon the relation of Ralph Falbo, Sr., alleging that his son, Nick Falbo,[2] was illegally restrained of his liberty under a commitment and judgment of the United States District Court for the Western District of Pennsylvania based upon an indictment returned in such court charging said Falbo with an alleged violation of the Selective Training and Service Act of 1940 by failing to report for induction pursuant to an order of the local draft board. (Ap. F. pp. 1-14) The District Attorney for the Southern District of West Virginia appeared before the United States District Judge upon the presentation of the petition for writ of habeas corpus and filed and urged a written motion to dismiss the respondents because of a misjoinder of the parties and alleging that respondents were not proper parties. (Ap. F. p. 15) The motion was granted as to the respondent Biddle and denied as to the respondent Kennedy. (Ap. F. pp. 18-19) Thereupon the respondent Kennedy urged his written demurrer and motion to dismiss because of failure of the petition to state a cause for action. (Ap. F. p. 15) After hearing argument on said motion the trial court sustained the motion and rendered an order refusing to issue the writ and dismissing the petition for writ of habeas corpus. (Ap. F. p. 20) The appellant duly excepted to the action of the court below and thereafter duly perfected an appeal to this court.

[2] Nick Falbo will hereafter be referred to sometimes as *petitioner*, which is the description used in the petition for writ of habeas corpus.

FACTS ALLEGED

In the petition for writ of habeas corpus it is alleged that Nick Falbo is held by the respondent M. L. Kennedy, Superintendent, and Francis Biddle, Attorney General, by virtue of a judgment rendered and commitment issued by the District Court of the United States for the Western District of Pennsylvania which are based upon a verdict of the jury convicting defendant Falbo of an alleged violation of Section 11 of the Selective Training and Service Act of 1940. In the indictment it was alleged that Falbo unlawfully and knowingly failed to report for induction as ordered by his local draft board.

It was further alleged that the judgment against Falbo was rendered and entered on December 1, 1942, and that he was committed to the custody of the Attorney General for a period of five (5) years and that no fine or costs were imposed.

Ralph Falbo, Sr., the relator, alleged that the indictment and proceedings had against Nick Falbo in the said district court, including the judgment and commitment, were illegal and void because the draft boards had no jurisdiction and authority to order him to report for induction and thereafter to institute delinquency proceedings against him in the district court by reason of the fact that he was exempt from all training and service under the Act because a minister of religion within the meaning of the exemption provided by Congress in Section 5 (d) of the Act and the Regulations thereunder. It was further alleged that the Selective Service System arbitrarily and capriciously rejected his claim for exemption, classified him as liable for training and service contrary to the undisputed evidence, and without substantial evidence to support said classification, was without jurisdiction and acted in excess of its authority conferred by the statute and regulations, and denied him his rights and liberty contrary to the due process clause of the Fifth Amendment to the United States Constitution.

In this connection it was alleged that Falbo duly registered under the Selective Training and Service Act of 1940 on October 16, 1940, with Local Board 11, West Newton, Pennsylvania, and thereafter filed his questionnaire and other documentary evidence showing conclusively that he was a regular and duly ordained minister of religion since July 1, 1930, and associated with Jehovah's witnesses, an organization recognized by the Selective Service System as a religious organization under the Act, and of which the Watchtower Bible and Tract Society, Inc., is the legal governing body. He requested that he be granted his exemption as a minister pursuant to Section 5 (d) of the said Act. On August 25, 1941, he was illegally classified in tentative Class One and his claim for classification as a minister exempt from training and service and evidence in support thereof rejected and not considered by the board.

On January 19, 1942, the local board placed the said Falbo in class 1-A, liable for military training and service, and rejected his claim for exemption as a minister. On January 26 Falbo duly appealed to the Board of Appeal. Pending his appeal the Department of Justice conducted an investigation as to his status as a conscientious objector at which additional proof of his ministerial status was received and filed with the draft boards. Upon the report of the Department of Justice the Board of Appeal changed his classification from 1-A to 4-E, which made him liable for service under civilian direction to do work of national importance in a conscientious objectors' camp. The appeal board continued to deny and reject his claim for exemption as a minister and ignored all evidence in support thereof. Falbo applied to the Pennsylvania headquarters of the Selective Service System and to the National Director to exercise discretion to review his case, suspend induction process and take an appeal, all of which was denied by the State Director in the exercise of his discretion under Section 628.1 of the Selective Service Regulations.

In addition to the above mentioned allegations it was

alleged that the draft boards had acted arbitrarily and capriciously in rejecting his claim and withholding his exempt classification as a minister because there was no evidence before the boards which disputed his claim for exemption; that the boards did not contend that he was an impostor or that he fictitiously or falsely made a claim for exemption as a minister of religion, or that he did not in truth and in fact represent the Watchtower Bible and Tract Society as one of Jehovah's witnesses and that the undisputed evidence before the boards showed that he was a minister within the meaning of Section 5 (d) of the Selective Training and Service Act and the Regulations thereunder.

Thereafter the local board on August 21, 1942, ordered Falbo to report for induction on September 2, 1942. He declined to report, claiming that the order was invalid and void for the reason that the board did not have jurisdiction to order him to report, that the order was in excess of authority because of the exemption of Falbo under Section 5 (d) of the Selective Training and Service Act as an ordained minister of religion.

It is further alleged by Falbo that a plea of not guilty was urged to the indictment and that on December 1, 1942, after hearing the evidence admitted by the court, a jury convicted him, as charged in the indictment. It was further alleged that upon the trial of the indictment before a jury in the district court Falbo was denied his constitutional rights of a fair trial and the right to be heard in his defenses contrary to the Constitution. The trial judge denied him the right to introduce evidence challenging the validity of the order to report upon the grounds heretofore stated. The court also charged the jury that it could not consider the invalidity of the order to report and limited the sole question to be determined by the jury to whether or not Falbo knowingly refused to report as directed by the draft board and forbade the jury to determine whether or not Falbo was exempt from duty. By reason of this action of

the trial court under the Selective Training and Service Act it is alleged that the act has been converted into a *bill of attainder,* contrary to clause 3 of section 9 of Article I of the United States Constitution; and that as construed and applied the Act and Regulations penalize him by denying his defenses for failure to report for induction and that such illegally transfer the judicial power of the courts to the draft boards, contrary to Article III of the Constitution, denied him his right of trial by jury contrary to the Sixth Amendment, denied him his right to a judicial trial and his liberty and rights contrary to the due process clause of the Fifth Amendment. (See Ap. F. pp. 10-12)

Reasons Relied on for Allowance of Writ

The questions presented here are of great importance and show that grave error has been committed by the courts below against the Constitution and the rights of petitioner through an illegal suspension of the writ of habeas corpus because of petitioner's being charged with contempt of the administrative agency. The construction placed upon the Selective Training and Service Act by this court in the case of *Falbo* v. *United States,* 320 U. S. 549, does not permit the denial of the writ of habeas corpus. The court confined its decision in that case to the narrow issue presented as to whether the Congress intended to permit a defense to an indictment in a criminal case.

The denial of this defense to the petitioner upon his trial made him helpless and the victim of a trial by ordeal and by bill of attainder or pains and penalties. He was, upon that trial, as helpless as he would have been on the same question of exemption upon a trial by general court-martial if he had been illegally inducted into the armed forces. The fact that the law does not permit judicial interference with court-martial or defenses to indictments drawn under the Selective Training and Service Act does not abridge or shorten the authority of the federal courts to

exercise their powers of judicial review of an arbitrary and illegal order of an administrative agency which throws a person into the path of prosecution, either by court-martial or in the district court, based upon such administrative order.

The writ is available to review administrative action which confers jurisdiction upon the armed forces. By force of the same reason the writ of habeas corpus issues to test the validity of the same agency which confers jurisdiction upon the Department of Justice to institute delinquency proceedings in the federal courts against which Congress has denied the defendant the right to make a defense. The opinion of the court below is in direct conflict with the opinion of the United States Circuit Court of Appeals in the case of *Ver Mehren* v. *Sirmeyer,* 36 F. 2d 876, (8th); *Ex parte Stewart,* 47 F. Supp. 410.

The decision of the court below is in conflict with applicable decisions of this court approving the use of the writ of habeas corpus to inquire into the obligations of the petitioner alleged to be subject to military duty. *Ex parte Reed,* 100 U. S. 13; *In re Grimley,* 137 U. S. 147; *In re Morrissey,* 137 U. S. 157; *Johnson* v. *Sayre,* 158 U. S. 109; *Givings* v. *Zerbst,* 255 U. S. 11, 20.

The petitioner cannot be legally required to report for induction, surrender his civilian status, and assume heavier obligations and military status for violation of which he could be severely punished, as a condition of obtaining judicial review of an illegal administrative order. The imposing of this requirement as an excuse for suspending and denying the writ of habeas corpus brings the decision of the court below into conflict with applicable decisions of this court in the cases of *Cobbledick* v. *United States,* 309 U. S. 323; *In re Burrus,* 136 U. S. 586; *Ex parte Fisk,* 113 U. S. 713, 718; and *Sibbach* v. *Wilson & Co.,* 312 U. S. 1, 16.

The holding of the court below is in conflict with the applicable decisions of this court in the cases of *Oklahoma*

Operating Co. v. *Love,* 252 U. S. 331; *Wadley Southern Ry. Co.* v. *Georgia,* 235 U. S. 651, 660-663; in which cases it is held that chancery writs are available to protect one from an illegal order of an administrative agency which provides for review only upon condition to severe penalties.

Since the writ of habeas corpus is available to go behind a judgment of conviction and entirely outside the records to prove that due process of law and the fundamental rights of the prisoner have been violated by perjured testimony, illegal confession, coerced plea of guilty, illegal indictment, and the denial of counsel, it is also available to go behind a judgment of conviction and *dehors* the record to determine whether an indictment and a judgment of conviction under the Selective Training and Service Act of 1940 are based upon an illegal order of an administrative agency issued as a result of a violation of the requirements of due process provisions of the Fifth Amendment. Accordingly, the opinion of the court below conflicts with the applicable decisions of this court in *Moore* v. *Dempsey,* 261 U. S. 86; *Mooney* v. *Holohan,* 294 U. S. 103, 113; *Escoe* v. *Zerbst,* 295 U. S. 490; *Johnson* v. *Zerbst,* 304 U. S. 458; *Bowen* v. *Johnson,* 306 U. S. 19; *Holiday* v. *Johnson,* 313 U. S. 342; *Waley* v. *Johnston,* 316 U. S. 101, 104; *Pyle* v. *Kansas,* 317 U. S. 213; *Walker* v. *Johnston,* 312 U. S. 275, and *Smith* v. *O'Grady,* 312 U. S. 329.

The line of cases holding that the petition for writ of habeas corpus cannot be substituted for an appeal or writ of error does not apply here. There are two reasons. The inquiry as to the validity of the order and the process of going behind the judgment into the administrative proceedings cannot be urged in defense to the indictment or upon appeal. The allegations made against the validity of the administrative proceedings and the trial of the petitioner before the district court are of such a character as to make void the entire proceedings so as to make the same subject to collateral attack. Therefore the exception to the general rule which is recognized and applied in

the cases last above cited controls here.

In the holding that the petitioner cannot obtain judicial review on the writ of habeas corpus because there was a failure to comply with the order of the administrative agency the court below ruled in conflict with the applicable decision of this court in the case of *Gonzales* v. *Williams*, 192 U. S. 1, where it is said that "she was not obliged to resort to the Superintendent or the Secretary" as a condition precedent to applying for the writ. The decision of the court below conflicts with *Lloyd Sabaudo* v. *Etling*, 287 U. S. 329; *Kessler* v. *Strecker*, 307 U. S. 22, 34-35; and *Ng Fung Ho* v. *White*, 259 U. S. 276.

The denial of the writ because of his failure to report for induction is an illegal suspension of the writ of habeas corpus contrary to the holding of this court in *Ex parte Milligan*, 4 Wall. 2; *Ex parte Quirin*, 317 U. S. 1. Compare the opinion of Chief Justice Taney in *Ex parte Merryman*, 17 Fed. Cases. 144, 153.

As further reasons for the granting of this petition each and every reason discussed and relied upon by *Charles Milburn Clayton* and *Thomas Howard Stull* in their petitions for writ of certiorari, filed simultaneously with this petition, are referred to here and incorporated herein as though copied at length herein. (See *Clayton* petition, pp. 17-25; and *Stull* petition, pp. 14-23.)

The right of petitioner for the writ of habeas corpus does not depend upon whether there is a Constitutional exemption from the performance of military duty. The inherent right to liberty of person is guaranteed by the Constitution, and the exemption from duty is a right created by Congress which cannot be left entirely to an administrative agency for determination without violating the provisions of the Constitution guaranteeing a judicial trial. If Congress by passage of the Selective Training and Service Act repealed the provisions of sections 451-464 of Title 28 of the *United States Code*, there should be a discussion thereof by this court. The construction placed

upon the Selective Training and Service Act by the court below repeals the provisions of the Habeas Corpus Act by implication, which is in conflict with the decisions of this court holding that there cannot be a repeal by implication.

Petitioner asserts that the courts below have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision to halt the same. It is submitted that this case is one calling for the exercise of the jurisdiction and authority of this court under the statutes and the Constitution.

SUPPORTING BRIEF

Upon the question of mootness urged upon the court by the motion of the government in the court below and also upon each of the questions presented upon this petition for writ of certiorari an argument is made by petitioner in his supporting brief. The supporting brief usually printed as a part of the petition for writ of certiorari has been prepared, printed and filed separately. The court is referred to said separate brief filed herein and requested to consider the same as a part of this petition and with this petition before deciding whether the writ should be granted. It is submitted that grave and substantial questions are presented which need a determination by this court after full argument by counsel in open court; and to this end the petition for writ of certiorari as hereinafter prayed for should be granted.

WHEREFORE your petitioner prays that this court exercise its discretion by directing the issuance of a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit, directing such court to certify to this Court for review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the order of the Circuit Court of Appeals, affirming the judgment of the district court, be here set aside and held for naught; and that your petitioner be granted such other further relief in the premises as to this Court may seem just and proper under the circumstances.

RALPH FALBO, SR.
Relator-Petitioner

By HAYDEN C. COVINGTON
Attorney for Petitioner